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International Convention for the Protection of All Persons from Enforced Disappearance

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Chairperson: Mr. Decaux

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The meeting was called to order at 3 p.m.

Consideration of reports of States parties to the Convention (*continued*)

Initial report of Serbia (CED/C/SRB/1 and CED/C/SRB/Q/1)

1. *At the invitation of the Chairperson, the delegation of Serbia took places at the Committee table.*

2. **Mr. Odalovic** (Serbia) said that, since 2006, Serbia had been an independent State that was committed to building a democratic society based on respect for human and minority rights. It was a party to eight international human rights treaties and had ratified a number of Council of Europe conventions on human and minority rights. Under the Serbian Constitution, international laws and treaties formed part of the national legal order and were applied directly.

3. Although Kosovo and Metohija were an integral part of the territory of Serbia on the basis of Security Council resolution 1244 (1999), the State party was unable to implement the International Convention for the Protection of All Persons from Enforced Disappearance in that province as its administration had been entrusted to the United Nations Interim Administration Mission in Kosovo (UNMIK). While the State party was willing to provide the Committee on Enforced Disappearances with any information it had in relation to the implementation of the Convention in Kosovo and Metohija, the Committee might wish to consider asking UNMIK to furnish it with any additional information it might require.

4. Enforced disappearance appeared in the Criminal Code under crimes against human rights and freedoms, which included illegal deprivation of liberty, kidnapping, crimes against humanity and war crimes against civilians. Referring to paragraph 60 of the State party's report (CED/C/SRB/1), he said that, under the Law on International Legal Assistance in Criminal Matters, the provision of such assistance was not conditional on the existence of a treaty. In accordance with article 16 of the Convention, the Ministry of Justice took precautions to ensure that persons were not extradited to States where they might be in danger of being subjected to enforced disappearance. A list of safe countries of origin and safe third countries had been established.

5. Although reports suggested that some 10,900 persons from the region were still missing, Serbia remained committed to addressing the issue of missing persons in a responsible, organized way and recognized that such efforts were crucial to its process of reconciliation and the creation of a multi-ethnic society based on democracy, the rule of law and tolerance.

6. Serbia had established a Commission for Missing Persons in 2006 to collect data on missing persons, coordinate the work of the authorities in searching for missing persons and liaise between the authorities and the associations and families of missing persons. The administrative and technical affairs of the Commission were managed by the Missing Persons Unit at the Commissariat for Refugees, which kept records on missing persons and on exhumed, identified and unidentified human remains.

7. A working group had been established to step up efforts to locate and identify missing persons in the territory of the Autonomous Province of Kosovo and Metohija. A consolidated list of missing persons had been drawn up, and 1,617 cases of missing persons had been resolved.

8. The Commission for Missing Persons provided families with any information available about the missing person's death and offered various forms of assistance. For example, the State party bore the expense of transporting the remains of missing persons and part of the burial expenses.

9. The State party was aware of the challenges posed by the passage of time and the large number of persons still missing, but it had made a point of responding to every request it had received. It had carried out exhumations in every area that was suspected of holding remains and it had returned identified remains to the families. Any additional information on the location of missing persons or graves would be followed up on and verified. Moreover, the State party would seek to provide greater assistance to the families of missing persons with respect to administrative and other matters.

10. **Mr. Corcuera Cabezut** said that he would like to know whether any of the Convention's provisions might be incompatible with the Serbian Constitution. Were there any constitutional restrictions on human rights that ran counter to the provisions of the Convention? The State party should clarify which aspects of article 27 of the Constitution, on the right to freedom and security, could be suspended during a state of emergency or war.

11. He enquired whether any provisions of the Convention had been invoked by a complainant or applied by the authorities in cases that were not related to the crimes dealt with by the War Crimes Department of the Higher Court in Belgrade. Clarification on how article 332 of the Criminal Code would be applied to a potential case of enforced disappearance would be welcome. Were any initiatives under way to include enforced disappearance as a separate crime in national legislation and, if so, how long would the legislative process take?

12. The State party should explain why no criminal charges had been filed during the period in association with cases of human trafficking that coincided with enforced disappearance. It should also indicate whether national law expressly prohibited the issuance of orders or instructions prescribing, authorizing or encouraging enforced disappearance and held persons who ordered such disappearances criminally responsible.

13. He asked what legal remedies were available to subordinates who were at risk of disciplinary measures for refusing to carry out crimes when ordered to do so by their superiors. The Committee would welcome further details on why the Military Security Agency did not have any examples of case law relating to the prohibition on invoking superior orders. Were any cases dealt with internally through disciplinary proceedings conducted by the armed forces? He asked whether the armed forces or other law enforcement authorities kept records of cases in which civil servants had refused to execute an order that would have constituted a punishable act. Did the Law on Civil Servants apply to police officers? Finally, referring to paragraph 43 of the State party's report, he asked what constituted "mitigating circumstances" in a potential case of enforced disappearance.

14. **Mr. Yakushiji** asked whether the fact that enforced disappearance did not constitute a separate criminal offence in Serbian law had any impact on the ability of courts to exercise jurisdiction in accordance with article 9 of the Convention. He wished to know whether personal and extraterritorial jurisdiction were no longer subject to the criterion of double criminality. He requested clarification as to whether the requirements set forth in article 10 of the Criminal Code had any implications for the obligations arising under article 9, paragraphs 1 and 2, of the Convention.

15. He asked which authorities were responsible for prosecuting and adjudicating offences committed by an employee of the Ministry of Defence or a member of the armed forces while in active service.

16. He wished to know what measures could be taken under Serbian law to ensure that military officers did not participate in the investigation of cases in which they were suspected of having had some kind of direct or indirect involvement. How would the State ensure the impartiality of the investigation of cases of enforced disappearance committed by Ministry of Defence or military personnel while in active service?

17. He asked which authority was responsible for deciding whether or not to suspend civil servants or police officers suspected of having committed an offence. He invited the delegation to elaborate on the statement made in the replies to the list of issues, which had been circulated informally, to the effect that an employee of the Ministry of the Interior could be suspended if his or her presence at work would harm the interests of the service. He would also like to know whether members of the armed forces or military police could be suspended from duty while under criminal investigation.

18. He requested information about the steps taken to bring to justice the perpetrators of any past acts of enforced disappearance committed in Serbia or by Serbian officials or by persons or groups of persons acting with such officials' authorization, support or acquiescence. He asked the delegation to comment on reports that progress in that regard had been slow because the Office of the War Crimes Prosecutor was under-resourced. While acknowledging that laws could not be applied retroactively, he asked why the Serbian courts did not consider acts of enforced disappearance as a crime against humanity in accordance with article 5 of the Convention, taking into account the continuous nature of the offence as established in article 8 thereof. It was the Committee's understanding that the majority of cases of enforced disappearance committed in the context of the armed conflict in the Federal Republic of Yugoslavia had been prosecuted as war crimes. He would therefore like to know what treatment would be given to cases of enforced disappearance that had occurred after the cessation of the conflict but which were a consequence of it, such as the case of the Bytyqi brothers. Would commanders and civilian superiors be prosecuted in such cases?

19. He asked how long it would take to complete improvements to the witness protection system and to establish a new witness protection unit. What measures would the State party adopt to ensure the independence of the unit?

20. He invited the delegation to comment on allegations that witnesses in war crimes trials had been threatened by officials charged with their protection. Were any of those cases related to investigations of cases of enforced disappearance? What measures were taken to ensure that officials suspected of threatening witnesses were suspended from duty as a preventive measure and, where appropriate, prosecuted and punished?

21. He wished to know whether the Public Prosecutor's Office for War Crimes and the War Crimes Investigation Service had immediate access to any place of detention or any other place where there were reasonable grounds to believe that a disappeared person might be present and, if so, whether there were any restrictions on that access. Did the Public Prosecutor's Office for War Crimes have unrestricted access to the archives of the military and police forces?

22. He enquired whether any requests for international judicial assistance had been refused on the basis of article 7 of the Law on International Legal Assistance in Criminal Matters.

23. Lastly, he asked the delegation whether it could provide any examples of cases in which the Convention had been used as a basis for extradition. Had extradition requests been granted in cases of enforced disappearance? Had the State party ever refused a request for extradition relating to a person sought in a case of enforced disappearance, unlawful deprivation of liberty or abduction and, if so, on what grounds?

24. **Mr. Hazan** asked whether the State party had received any requests for cooperation from any other States in relation to cases of enforced disappearance and, if so, what the outcome had been. What mechanisms existed to deal with requests from other States relating to the search for persons who had disappeared in the territory of the State party?

25. **Ms. Janina** said that she wished to recall the importance attached by the Committee to the involvement of families of victims' organizations, human rights defenders working on the issue of enforced disappearance and non-governmental organizations in the preparation of reports. Such involvement not only enhanced the quality of the reports but also promoted the enjoyment of the rights set forth in the Convention. In that connection, she wished to know what the Government had done to act upon information submitted to it by civil society organizations during consultations leading up to the preparation of the initial report.

26. According to information received by the Committee, the Government was unwilling to open State archives to the general public — or even to the Office of the War Crimes Prosecutor — to allow research into the location of graves. She would therefore like to know who had the right to access those archives and how that right was exercised in practice.

27. Lastly, she wished to know whether the Government intended to comply with its obligation under article 4 of the Convention to ensure that enforced disappearance constituted an offence under its criminal law.

The meeting was suspended at 4.05 p.m. and resumed at 4.50 p.m.

28. **Mr. Odalovic** (Serbia) said that to date no provisions of the Convention had been identified as being incompatible with the Constitution.

29. **Ms. Mirovic** (Serbia) said that, although the crime of enforced disappearance did not constitute a separate offence in national legislation, it was an act that was prosecuted ex officio under criminal law.

30. **Ms. Vazic** (Serbia) said that, during a state of emergency or war, the exercise of certain human rights could be restricted under article 27 of the Constitution by order of the competent authority. However, all such orders were subject to review by the Constitutional Court.

31. The Government was currently drafting legislative amendments designed to ensure that the crime of enforced disappearance was specifically covered under the Criminal Code. It was likely that those amendments would be passed into law in early 2016.

32. The provisions of article 332 of the Criminal Code concerning the failure to report the preparation or commission of a criminal offence could be applied in cases of enforced disappearance in conjunction with other provisions of the Code relating to unlawful deprivation of liberty or abduction.

33. **Mr. Rabrenovic** (Serbia) said that a military officer or other State official who ordered an enforced disappearance would be liable to punishment under the Criminal Code.

34. **Mr. Pantic** (Serbia) said that, under the Police Act, police officers were not obliged to obey an order if they believed that following it would involve the commission of a crime or contravene the law. In such circumstances, the officer or officers concerned could ask for the order to be provided in writing. No complaints had been filed with the competent authorities in that regard.

35. **Ms. Vazic** (Serbia) said that any person who ordered the commission of a crime of enforced disappearance would be held criminally responsible as a co-offender. According to well-established Serbian case law, no one might invoke an order from a superior authority to justify any offence, including one of enforced disappearance.

36. **Ms. Mirovic** (Serbia) said that the fact that enforced disappearance was not defined as a separate offence in national law was not an obstacle to the exercise of jurisdiction by the Serbian courts over acts of enforced disappearance committed in the territory of Serbia

or committed abroad by or against Serbian nationals. However, the prosecution of an offence in Serbia was subject to the requirement of double criminality inasmuch as equivalent — but not necessarily identical — provisions should exist in the two jurisdictions concerned.

37. **Mr. Rabrenovic** (Serbia) said that since 2004 civilian authorities had jurisdiction over criminal offences committed by employees of the Ministry of Defence or members of the armed forces while on duty. Prosecutions related to war crimes were handled by the War Crimes Prosecutor.

38. **Mr. Dilparic** (Serbia) said that the new Criminal Code that had entered into force in Serbia following the submission of the State party's initial report to the Committee in September 2013 stipulated that investigations were the exclusive competence of the public prosecutor. The involvement of the military police was limited to informing the relevant prosecutor's office that a criminal offence had been committed. Prosecutors had discretion to decide whether certain officials, including police officers, could take part in the investigation. Given their ages and the amount of time that had elapsed since the commission of the war crimes currently being investigated in Serbia, the members of the war crimes investigation and prosecution teams could not possibly have been involved in those crimes.

39. **Mr. Odalovic** (Serbia) said that the rules relating to the exclusion of public servants from investigations were well defined in the normative framework. However, because of the lack of cases of enforced disappearance, no practice had been developed with specific reference to such cases.

40. **Ms. Vazic** (Serbia) said that the rules relating to the application of mitigating circumstances in connection with an act of enforced disappearance were the same as those for other criminal offences, as stipulated in article 56 of the Criminal Code. An individual's contribution to shedding light on the whereabouts of a person in an enforced disappearance case would certainly be regarded as a mitigating circumstance, and prosecutors had the prerogative to engage in plea bargaining with defendants in order to obtain such information.

41. **Mr. Rabrenovic** (Serbia) said that, in the context of the European Union accession negotiations that were currently under way with Serbia, the European Commission had issued a number of recommendations in its *Serbia Progress Report* of October 2014 that related to the domestic processing of war crime cases. In response to the Commission's recommendations, the Government had formulated an action plan, whose implementation had been entrusted to the Ministry of Justice. Over the course of the past year the Ministry had contacted all the relevant State authorities about the action plan and had submitted the plan to civil society organizations in order to solicit their views. The finalized plan had been submitted to the European Commission. The Ministry of Justice, in conjunction with other relevant State bodies, would embark on a capacity-building effort for the Office of the War Crimes Prosecutor during the period 2015–2018, as indicated in the action plan.

42. Since the law did not define what constituted a crime against humanity, the War Crimes Department of the Higher Court in Belgrade had not yet heard a case in which a criminal offence had been qualified as such. However, that did not mean that, in future, such a definition might not be incorporated into the law. Since the submission of the initial report, progress had been made in the adjudication of cases relating to the applicability of rules of international humanitarian law in cases where the offence had been committed after the cessation of the armed conflict in Kosovo. The Supreme Court of Cassation had handed down decisions in both the Gnielena and Bytyqi cases in which it had considered that the end of the conflict in Kosovo could be interpreted as being 20 June 1999.

43. Serbia had developed a full-fledged witness protection system that included the establishment of a witness protection unit in the Ministry of the Interior. The unit had been allocated the necessary financial and human resources to carry out its activities, including training for its staff of psychologists, sociologists and other experts. The action plan submitted to the European Commission contained proposed improvements to the system, such as independent oversight, in response to allegations that witnesses in war crimes trials had been threatened by members of the unit. The Public Prosecutor's Office and the Office of the War Crimes Prosecutor had unrestricted access to places of detention in the country and to military and other archives.

44. **Ms. Pavlovic** (Serbia) said that Serbia had signed the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocols thereto and enacted the Law on International Legal Assistance in Criminal Matters, which established the conditions for providing legal assistance to States with which it had no treaty in force or where the treaty did not regulate a particular matter. Among the preconditions for the execution of requests for mutual assistance stipulated in the Law were that the offence in question must constitute an offence under Serbian law; that such requests must not relate to a political offence or to an offence comprised solely of the violation of military duties; and that the execution of the request must not impinge on the sovereignty of the Republic of Serbia. It also stipulated that mutual assistance was to be granted in cases of violations of international humanitarian law that were not subject to statutory limitations.

45. Decisions on whether to grant requests for extradition were made by the Minister of Justice. The Law on International Legal Assistance in Criminal Matters provided that extradition could be granted for the purposes of prosecution of offences that were punishable under Serbian law by sentences of at least 1 year's imprisonment. If extradition were granted, the defendant could not be extradited to a third State for a criminal offence that had been committed before the extradition and which was not the subject of the extradition. The Ministry of Justice decided on a case-by-case basis whether there were grounds for believing that the person sought for extradition would be in danger of being subjected to enforced disappearance in the requesting State.

46. **Mr. Odalovic** (Serbia) said that the Government of Serbia had transferred numerous documents from police and military archives to various working groups and government commissions on missing persons in the region. In the case of Kosovo, it had shared more than 2,500 files with the Pristina delegation of the working group on missing persons in the territory of the Autonomous Province of Kosovo and Metohija, and in the case of Croatia, it had shared some 1,100 documents on the fate of the wounded and ill in the Vukovar hospital incident. The Government remained committed to granting all requests for consultation of its archives.

47. The Office of the War Crimes Prosecutor was immediately informed whenever the Government received a request for exhumation in the territory of Serbia, and orders were issued to review the relevant information and investigate the location. When human remains were found at the location, then the matter was turned over to the judicial authorities. In the Raška case, after the first human remains had been located, the judicial authorities had processed the case in a fully transparent manner in the presence of international representatives from the Pristina delegation, the European Union Rule of Law Mission in Kosovo and the United Nations Interim Administration Mission in Kosovo (UNMIK). The various national commissions on missing persons in the region had reciprocal arrangements for monitoring exhumations in which one or more countries might have an interest.

48. A regrettable incident had occurred in Serbia in which family members of missing persons had been told misinformation claiming that their loved ones were still alive in secret prisons. The heads of the Belgrade and Pristina delegations had both signed

statements on behalf of the missing persons institutions they represented to certify that there were no such secret prisons.

49. **Mr. Corcuera Cabezut** said that, although enforced disappearance had not been classified as a separate offence in the Criminal Code, victims and other stakeholders could still invoke the Convention directly before the courts. Some of the areas in which the Convention could be applied directly were the training of government officials, victims' rights, extradition and non-refoulement. The only aspect of the Convention that was not directly applicable was that pertaining to the penalties for the offences covered by the Convention, which each State party had to lay down in its national legislation.

50. **Mr. Yakushigi** requested an account of how an act of enforced disappearance that had been committed outside the territory of Serbia would be prosecuted by Serbian courts if that act had not been defined as a separate offence in the criminal codes of both countries. When an act of enforced disappearance was punishable as the sum of its constitutive elements in each country, there were likely to be discrepancies between those elements.

51. He wished to have a full explanation of the changes that had been made to the criminal investigation procedure, particularly in terms of the involvement of the Prosecutor General and the prosecution of members of the armed forces who had been implicated in war crimes.

52. **Mr. Hazan** asked whether a case of enforced disappearance for which international assistance in criminal matters had been requested would be regarded as a political offence and if assistance could be provided in such cases under Serbian law. Noting that many characteristics of the offence of human trafficking overlapped with those of enforced disappearance, he asked whether any criminal complaints or proceedings relating to human trafficking had been registered and, if so, which offence had been alleged, which body had prosecuted them and what statistics could the State party provide on that situation.

The meeting rose at 6 p.m.